IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.109 OF 2001

DIST. BOMBAY

Atik Ahmed Abdul Hafiz Khan aged 41)
years, Occ: Business, R/o. New)
Sweelampur, Main Road, Jaffarabad,)
Galli No.8, R.No.9/A/157, Delhi – 53)
(Presently lodged at Thane Central)
Prison, Thane).) ... Appellant/Accused

Versus

The State of Maharashtra) ... Respondent

Mr. Khan Abdul Wahab for the appellant- accused.

Mr. K.Y. Saste, A.P.P. for the respondent- State.

CORAM : SMT. RANJANA DESAI &
D.G. KARNIK, JJ.

DATED : 29TH MARCH, 2006.

JUDGMENT : (Per Smt. Ranjana Desai, J.)

1. The appellant was tried in the Sessions Court at Bombay in

Sessions Case No.178 of 1997 for offence punishable under section 302 of the Indian Penal Code (for short, "the Code"). By the impugned judgment and order dated 11/12/2000, the appellant was convicted under section 302 of the Code and sentenced to life imprisonment. The said judgment and order is challenged in this appeal. For the sake of convenience, the appellant will be referred to in this judgment as "the accused".

2. The prosecution story may be shortly stated :

The accused is the brother of the wife of deceased Bundukhan. According to the prosecution, three months prior to the incident in question, the accused started residing in a room owned by deceased Bundukhan situated at Panwali Goliwala Baba Chawl. The deceased had supplied to the accused garments worth Rs.50,000/- for conducting business. The deceased had demanded the said money but the accused refused to return it. He also did not vacate the room of the deceased. Therefore, on 26/1/1996 in the morning, the deceased removed the lock of the said room in which he had allowed the accused to reside and put his own lock on the said room.

3. According to the prosecution, on 26/1/1996, which was a fifth

or sixth day of Ramzan month, the deceased was in the shop of his relative PW-3 Haji Munna Khan. At that time, the accused came to the said shop and called deceased Bundukhan outside the shop and asked him as to why he had removed his lock and put his lock on the said room. The deceased replied that he had done so because the accused had failed to refund the amount and also because he had failed to vacate the said room though he had promised to vacate it. At this, the accused got enraged. He took out the knife from his pant pocket and gave two to three blows on the stomach of deceased Bundukhan. Deceased Bundukhan ran towards Behrampada to save himself. The accused ran towards Navpada with the knife. Deceased Bundukhan was taken to the Bhabha Hospital by his son and PW-6 Badarkhan Shamsuddin Khan. In the Bhabha Hospital PW-4 Dr. Santosh Krishnarao Revenkar examined deceased Bundukhan. He noted down the injuries found on the deceased in the casualty register at about 5.57 p.m.

4. PW-7 PSI Suresh Ingole, the Investigating Officer received telephonic message from the police constable attached to the Bhabha Hospital that one person was found in an injured condition due to stabbing and was admitted in the Bhabha Hospital. On receiving this message PW-7 PSI Ingole informed PW-8 P.I. Shrirang Shedge. They went to the Bhabha Hospital. PW-7 PSI Ingole sought the opinion of

PW-4 Dr. Revenkar as to whether deceased Bundukhan was in a position to give statement. PW-7 PSI Ingole then recorded the statement of deceased Bundukhan, which is treated as FIR (Ex-25). In this statement, deceased Bundukhan, inter alia, stated that the accused had assaulted him with knife. On the basis of this FIR, investigation was started. The deceased succumbed to his injuries at Bhabha Hospital on 23/4/1996. Post-mortem was conducted by PW-5 Dr. Harshavardhan Baxi. PW-5 Dr. Baxi proved the post-mortem notes (Ex-18). According to the post-mortem notes, the cause of death was septicaemia followed by stab wounds. The accused was arrested at Delhi on 25/8/1996.

5. In support of its case, the prosecution examined as many as eight witnesses. The prosecution, inter alia, examined PW-1 Razia, the wife of deceased Bundukhan, PW-3 Haji Munna, who is the eye-witness, PW-4 Dr. Revenkar, who had examined the deceased on 26/1/1996 at the Bhabha Hospital, PW-5 Dr. Baxi, who had done the post-mortem of deceased Bundukhan and PW-6 Badarkhan, who had helped the son of the deceased to carry the deceased to the Bhabha Hospital. The details of investigation have been given by PW-7 PSI Ingole and PW-8 PI Shedge, who was attached to the Nirmal Nagar Police Station, at the relevant time.

6. The accused pleaded not guilty to the crime. He claimed to be tried. After perusing the evidence on record, the learned Sessions Judge convicted the accused as aforesaid and, hence, this appeal.

7. We have heard, at some length, Mr. Khan Abdul Wahab, the learned counsel appearing for the accused and Mr. Saste, the learned A.P.P. appearing for the State. With the assistance of the learned counsel, we have gone through the evidence and the record of the case.

8. Mr. Khan, the learned counsel for the accused contended that the learned Sessions Judge erred in convicting the accused because there is no cogent and credible evidence on record to establish the guilt of the accused. He submitted that PW-1 Razia is the wife of deceased Bundukhan. She is an interested witness. She has not seen the incident in question. She has only referred to oral dying declaration. Since the oral dying declaration is not corroborated by any other evidence on record, it is not prudent to rely on it. The learned counsel urged that the conduct of this witness is unnatural. She has stated that from the date of assault, till her husband's death, nobody has inquired about the incident with her. He submitted that there is no explanation as to why this witness has not lodged a complaint. She has further stated that she did not visit the hospital

on the day of the incident but, she visited the hospital on the next day. He submitted that being the wife of the deceased she should have rushed to the hospital immediately after the incident. Mr. Khan contended that it is also evident from the evidence of this witness that the relations between deceased Bundukhan and the accused were strained. Therefore, the possibility of this witness falsely involving the accused cannot be ruled out. So far as PW-3 Haji Munna is concerned, the learned counsel contended that the claim of this witness of being an eye-witness is false. He submitted that according to this witness on 26/1/1996 at about 5.30 p.m. the deceased had gone to his shop and they were talking. However, PW-1 Razia does not say that her husband was called by PW-2 Haji Munna. The story that deceased Bundukhan went to the shop of this witness itself is a concocted story. Mr. Khan pointed out that the accused and this witness own mango garden in Aligad and they were doing some business in partnership. This witness has admitted that since four years prior to the incident, he was alone looking after the accounts of the firm. Therefore, the relations between this witness and the accused appeared to be strained and, therefore, this witness has falsely involved the accused. The evidence of this witness, therefore, should not be believed. The learned counsel further contended that the statement of deceased Bundukhan recorded by PW-7 PSI Ingole also appears to be fabricated. He submitted that if

the deceased was alive for a long time, it is not understood as to why PW-7 Ingole did not call the Special Executive Magistrate for recording the dying declaration of deceased Bundukhan. The statement of deceased Bundukhan recorded by the police in the circumstances should not be believed. Mr. Khan contended that even the medical evidence is not consistent. PW-4 Dr. Revenkar had examined deceased Bundukhan on 26/1/1996 and PW-5 Dr. Baxi had done the post-mortem on deceased Bundukhan on 23/4/1996. There is no consistency between the injuries noted by these two doctors. PW-5 Dr. Baxi had admitted that in the post-mortem notes, no injury is mentioned as `incised wound on right side chest at 7th and 8th rib extending from mid clavicular line about 10 cms. below right nipple horizontal to anterior axillary line about 4 cms x 2 cms deep' whereas this injury is mentioned by PW-4 Revenkar. Variance in the evidence of these two witnesses indicates that the prosecution has suppressed the genesis of its case.

9. Mr. Khan submitted that in any event, intention to kill deceased Bundukhan cannot be attributed to the accused. The cause of death is stated to be septicaemia followed by stab wounds as alleged. The incident is of 26/1/1996. The deceased succumbed to his injuries on 23/4/1996. Therefore, he was alive for two months and three weeks. Death is, therefore, the result of septicaemia

followed by stab wounds because proper treatment was not given to the deceased and the wounds got infected. Mr. Khan pointed out that PW-5 Dr. Baxi has stated in his evidence that the injuries suffered by deceased Bundukhan were sufficient to cause death if proper and prompt medical treatment was not given to the patient. Mr. Khan submitted that, therefore, at the most, the accused could be convicted for offence under section 304 Part II of the Code and not under section 302 of the Code.

10. The learned A.P.P., on the other hand, submitted that no interference is necessary with the impugned judgment and order. He submitted that PW-1 Razia has no reason to involve any innocent person. Motive is established by the prosecution. The statement of deceased Bundukhan recorded by the police clearly indicates that it was the accused who dealt the fatal blows to deceased Bundukhan. The evidence of the eye-witness PW-3 Haji Munna furnishes the required corroboration. There can be, therefore, no doubt that the accused is guilty of the crime. The learned A.P.P. urged that the accused dealt three to four blows on deceased Bundukhan, some of which landed on vital part of the body of deceased Bundukhan. In such circumstances, it cannot be said that the accused did not harbour any intention to kill deceased Bundukhan. The learned counsel, therefore, urged that the impugned judgment and order

should be confirmed.

11. PW-3 Haji Munna has stated that the shop of deceased Bundukhan named as “Razia Garments” was adjoining his shop at Ghasbazar, Bandra (East), Mumbai. His shop is named as “Minu Choice” . The accused is his cousin. The accused was staying in the adjoining lane in a room owned by deceased Bundukhan. According to this witness on 26/1/1996 he was present in his shop at about 5.30 p.m. Deceased Bundukhan was in his shop. They were talking to each other. At that time, the accused called deceased Bundukhan outside by saying “as to why he had locked his room”. Thereupon, he took out a knife from his pocket and gave knife blows to deceased Bundukhan and ran away. The blows were given on the abdomen. After the assault, deceased Bundukhan went towards Navpada side holding his injured abdomen. Thereafter some persons carried him to the hospital. In his cross-examination, he has stated that the injured was subjected to three to four knife blows. He has admitted that he is doing some partnership business with the accused at Aligad in Uttar Pradesh but he has denied the suggestion that his relations with the accused were strained. His evidence in cross-examination is consistent with his evidence in the examination -in-chief. He is firm about the fact that the accused attacked deceased Bundukhan with knife. It is not possible to say that there was

enmity between this witness and the accused and, therefore, he has falsely implicated the accused. This witness appears to us to be a reliable witness.

12. PW-6 Badarkhan is the person who found deceased Bundukhan lying on the ground in an injured condition on the date of incident at about 6.00 p.m. He had stated that he helped the son of deceased Bundukhan to shift the deceased to the Bhabha Hospital. This witness is staying in the same area. He is related to the accused. It is pointed out that in the cross-examination, this witness has stated that there was a dispute between deceased Bundukhan and PW-3 Haji Munna as regards transfer of ownership of shop and there used to be quarrels between PW-3 Haji Munna and deceased Bundukhan. However, as we have noted earlier PW-3 Haji Munna has denied that there was any enmity between the two. In any case, the evidence of this witness does not have any adverse impact on the prosecution story. The alleged dispute between deceased Bundukhan and PW-3 Haji Munna has nothing to do with the incident in question and PW-3 Haji Munna would not involve the accused falsely because of the alleged dispute between him and deceased Bundukhan. He has also stated that the relations between PW-3 Haji Munna and the accused were strained. PW-3 Haji Munna has denied this. Even assuming their relations were strained in the circumstances of the

case we are not inclined to hold that PW-3 Haji Munna has falsely involved the accused. The evidence of this witness indicates how deceased Bundukhan was taken to the Bhabha Hospital.

13. PW-7 PSI Ingole has stated that on 26/1/1996 he received telephonic message about the incident in question. He was told that the injured was admitted in the Bhabha Hospital. He went to the Bhabha Hospital along with PW-8 PI Shedge. After seeking the permission of the doctor and after ascertaining that deceased Bundukhan was in a fit condition, he recorded the statement of deceased Bundukhan in the presence of the doctor. He has stated that the deceased told him that he was assaulted and stabbed by his brother in law i.e. the accused because he had given him Rs.50,000/- for business and had also allowed him to occupy one room but the accused did not return the money nor did he vacate the said room. Because the deceased insisted that the said amount be returned and the room be vacated, the accused had stabbed him. The amount of Rs.50,000/- and possession of the room was given to the accused by deceased Bundukhan three months prior to the incident in question. Deceased Bundukhan has further stated that on 26/1/1996 at about 5.35 p.m. he had gone to the shop of PW-3 Haji Munna. At that time, the accused came there and called him out. The accused asked him as to why he had put his lock on the said room. Deceased

Bundukhan told him that the accused had assured him that he would vacate the room and return Rs.50,000/- but he did not vacate the room nor did he return the money and, hence, he had locked the room. Hearing this reply, the accused got enraged. The accused took out a knife from his pant pocket and gave two to three blows on his stomach. PW-7 PSI Ingale has been cross-examined and in the cross-examination, he has stood firm.

14. PW-4 Dr. Revenkar who was on duty on the relevant date at the Bhabha Hospital has stated that on 26/1/1996 he had examined deceased Bundukhan at 5.57 p.m. and he found deceased Bundukhan in a fit condition to give his statement. According to him, the police sought permission from him to record the statement of deceased Bundukhan. He allowed the police to record the statement of deceased Bundukhan. He put the endorsement on the statement of deceased Bundukhan which is at Ex-23. We have seen the statement of deceased Bundukhan recorded by PW-7 PSI Ingole, which is at Ex-25. We have seen the endorsement made by PW-4 Dr. Revenkar that the patient is conscious and in a fit condition to give statement. The said endorsement is at Ex-33 and is signed by PW-4 Dr. Revenkar. We have no reason to disbelieve PW-4 Dr. Revenkar. Nothing has come in his cross-examination which can persuade us to disbelieve him. We have no hesitation in holding that

PW-7 PSI Ingole recorded the statement of deceased Bundukhan which is at Ex-25 after ascertaining from PW-4 Dr. Revenkar that deceased Bundukhan was in a fit and conscious condition to give statement. The said statement is not a fabricated statement. The said statement establishes that it is the accused who dealt blows on deceased Bundukhan because the deceased was asking him to return the money which he had taken from him and was asking him to vacate the room which he had allowed him to occupy and because deceased Bundukhan had removed the lock put by the accused and put his own lock on the said room.

15. We may also refer to the evidence of PW-1 Razia. PW-1 Razia is the wife of deceased Bundukhan. The accused is her brother. According to PW-1 Razia in the month of January, 1995 the accused was jobless. He had come to Bombay from his village situated near Aligad. In Bombay, deceased Bundukhan had provided him one room in Behrampada locality. Deceased Bundukhan had also provided him some garments worth Rs.50,000/- to start his business. Deceased Bundukhan had demanded the money from the accused but the accused did not pay the amount. He refused to pay the amount. Therefore, the relations between the two were strained. Deceased Bundukhan removed the lock of the room which he had given to the accused and locked the room with another lock.

According to PW-1 Razia, deceased Bundukhan was stabbed by the accused in the month of April, 1996 and this fact was informed to her by the deceased while he was in the hospital. This witness appears to be a truthful witness. She has no reason to implicate any innocent person. It is pertinent to note that the accused is her brother and unless the accusation is true, she would never level it against him. The fact that she did not go to the police or that she did not immediately visit the hospital cannot be taken against her. It is possible that having lost her husband, she was not in a proper frame of mind. She may be also scared to approach the police. We find no reason to disbelieve this witness. Oral dying declaration made by deceased Bundukhan to this witness may itself not be sufficient to indicate the guilt of the accused but it would provide one additional circumstance against the accused. Another circumstance which must be taken note of is that after commission of the offence, the accused absconded and he was arrested on 25/8/1996 at Delhi and brought to Nirmal Nagar on 27/8/1996. That means the accused was traced after about seven months. His absconding is an eloquent circumstance. We have therefore no hesitation in holding that the prosecution has proved its case beyond reasonable doubt.

16. We may also note, at this stage, that the accused was convicted in a double murder case by the 5th Additional Sessions Judge, Aligad

on 6/10/1997 and the said judgment and order of conviction and sentence was confirmed by the Allahabad High Court on 1/4/1987. It appears that at the stage of admission of the said appeal, the accused was released on bail and while on bail, he has committed this offence. We are aware that we must judge his involvement in the instant case strictly on the merits of this case and we must not be influenced by the fact that the conviction of the accused in a double murder case has been confirmed by Allahabad High Court. We make it clear that to us, the involvement of the accused in the instant case appears to be clearly made out by the evidence on record. His involvement in a double murder case is mentioned to make the record complete.

17. We must now come to the submission of Mr. Khan that the accused could be held guilty only of an offence under section 304 Part II of the Code. In this connection, it is necessary to note the injuries suffered by deceased Bundukhan which are noted by PW-4 Dr. Revenkar when he treated the deceased on 26/1/1996. PW-4 Dr. Revenkar found the following injuries.

> *"1) Incised wound on left side on anterior axillary like at level of 9, 10, 11 and 12th ribs with expulsion of chest abdominal contents. 4.5 cms*

x 3 cms. X ? depth. In the layman's terms the abovementioned injury implies it was a clean cut injury by sharp edged weapon on left front side of chest in the line of axillafold.

2) Incised wound on right side chest at 7t and 8th rib extending from mid clavicular line about 10 cms below right nipple horizontal to anterior axilliary line about 4 cms x 2 cms. X ? deep;

The above injury implies to be a clean cut on the right side of chest in the line of centre of collar bone, 10 cms. Below the right nipple."

18. PW-5 Dr. Baxi did the post-mortem on deceased Bundukhan and he found the following external injuries on the deceased.

1) *Left flank 5 x 2 cms. healed scal seen vertical upper tip is 18 cm below the left mid axillary line. The lower tip is 23 cms. Away in mid axillary line.*
2) *8 cms. Medically oblique healed wound 2 x 10 cms.*
3) *Right axilla open infected wound 9 cm x 4*

cm x 4 cm

4) *In mid line at mid abdomen infected open wound 15 x 8 cms.*
5) *Sutured wound in right iliac fossa 10 cm long (caecostomy wound) (surgical)*
6) *Sutured wound 3 cms, below injury No.5, 3 x 1 cms for the drain (surgical).*
7) *Infected wound on both buttocks of bed sore sacrum is seen 15 cms x 10 cms x Bone deep.*

19. It is pointed out to us that PW-5 Dr. Baxi has stated that on first page of the post-mortem notes, no injury is mentioned as incised wounds on right side chest at 7th and 8th rib extending from mid clavicular line about 10 cms. below right nipple horizontal to anterior axillary line about 4 cms x 2 cms deep. This injury is noted by PW-4 Dr. Revenkar. We do not find the absence of this injury in the post-mortem notes, a material circumstance from which adverse inference can be drawn against the prosecution. It is pertinent to note that when PW-5 Dr. Baxi was confronted with the fact that against injury No.2 on the first page of post-mortem notes, it is mentioned that there is a fracture of IXth to XIth ribs and on the second page of the post-mortem notes against the heading “Thorax”, sub-heading “Chest Wall Ribs Cartilages”, no fracture was seen, PW-5 Dr. Baxi has

stated that the first page of the post-mortem notes was noted down on 26/1/1996 whereas column at page 2 of the post-mortem note was noted down on 23/4/1996 and, therefore, in his opinion, there was sufficient time for the fracture to heal. In our opinion, same logic will apply to the absence of injury No.1 mentioned by PW-4 Dr. Revenkar in the post-mortem notes. While PW-4 Dr. Revenkar examined deceased Bundukhan on 26/1/1996, the post-mortem was done by PW-5 Dr. Baxi on 23/4/1996. It is possible that during this period, this injury had healed. Besides, there is always a room for some errors. It is well settled that ocular evidence always overrides the medical evidence and, if there are any discrepancies in the medical evidence they do not disprove the prosecution case if the ocular evidence is found to be reliable. In this case, PW-3 Haji Munna has categorically stated that he had seen the accused assaulting deceased Bundukhan 3 to 4 times. We have already held that there is no reason to disbelieve this witness. Therefore, this discrepancy in the description of the injury does not adversely affect the prosecution case.

20. We are also not impressed by the fact that because the cause of death is septicaemia followed by stab wounds, it can be said that the accused had no intention to kill deceased Bundukhan. PW-5 Dr. Baxi has denied that the septicaemia is due to medical negligence. It

is true that PW-5 Dr. Baxi had also stated the said injury is sufficient to cause death if proper and prompt treatment was not given to the patient but PW-5 Dr. Baxi has also added that the injuries sustained by deceased Bundukhan could cause death even in the absence of septicaemia as they involve vital organ like liver and spleen and kidney. The injuries are serious. PW-5 Dr. Baxi has stated that the accumulation of the blood in the abdominal cavity shows that liver and spleen were damaged. There was injury on the chest. It was a penetrative wound. There is no indication in the evidence that deceased Bundukhan who was the benefactor of the deceased had given any immediate cause for the accused to assault him so brutally. In the circumstances, it is not possible for us to come to the conclusion that the accused had no intention to commit murder of deceased Bundukhan. This submission of Mr. Khan is, therefore, rejected. In the circumstances, we find no reason to interfere with the impugned judgment and order. We, therefore, dismiss the appeal. We direct the Superintendent of Jail where the accused is lodged to inform the Uttar Pradesh Police about the fact that the accused whose conviction and sentence is confirmed by the Allahabad High Court in Criminal Appeal No.2293 of 1977 is undergoing imprisonment in the State of Maharashtra. This communication is necessary because the Uttar Pradesh Police must be looking for the accused in view of the fact that the Allahabad High

Court by its judgment and order dated 4/8/1987 in Criminal Appeal No.2293 of 1977 confirmed the sentence of life imprisonment imposed on him and has ordered that the accused be taken into custody forthwith to serve out the sentence awarded to him.

(SMT. RANJANA DESAI, J.)

(D.G. KARNIK, J.)